IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 24,2007 Session

STATE OF TENNESSEE v. GEORGE ARTHUR LEE SMITH, NATHANIEL ("NAT") ALLEN, AND SHANNON LEE JARNIGAN

Direct Appeal from the Criminal Court for Hamblen County
Nos. 05CR239, 05CR429, 05CR240 James Edward Beckner, Judge

No. E2006-00984-CCA-R3-CD - Filed November 19, 2007

A Hamblen County jury convicted each Defendant of one count of first degree premeditated murder and each was sentenced to life in prison. On appeal, the Defendants contend the following: (1) the evidence is insufficient to sustain their convictions; (2) the evidence is insufficient to sustain the jury's finding that Hamblen County was a proper venue for this case; (3) the trial court erred when it denied the Defendants' motion for change of venue; (4) the trial court erred when it consolidated the Defendants' cases for trial; (5) the trial court improperly accepted the State's peremptory challenges of two potential jurors; (6) the trial court improperly allowed a juror to remain on the panel when the juror should have been disqualified for actual bias or prejudice; (7) the trial court improperly admitted an audio recording of a conversation between Defendants Smith and Jarnigan; and (8) the trial court improperly admitted evidence about Defendant Allen's prior criminal charge for delivery of cocaine. Finding that there exists no error, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J.C. MCLIN and D. KELLEY THOMAS, JR., JJ., joined.

Jonathan M. Holcomb, Morristown, Tennessee, for the Appellant George Arthur Lee Smith.
Douglas Payne, Greeneville, Tennessee, for the Appellant, Nathaniel ("Nat") Allen.
William Louis Ricker and Kim C.Miller, Greeneville, Tennessee, for the Appellant Shannon Lee Jarnigan.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; C. Berkeley Bell, District Attorney General; Victor Vaughn, Kim Lane, and Connie Troubaugh, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the murder of Donald Wilder, Jr., which occurred in June of 2003. The State alleged that Defendant Smith shot and killed Wilder with the assistance of his girlfriend, Defendant Jarnigan. The State further alleged that Defendant Allen requested that the murder be committed, provided drugs to assist in the killing, and provided money and drugs in exchange for the killing. The Defendants were all charged with first degree premeditated murder, with Defendants Jarnigan and Allen being charged under the theory of criminal responsibility.

At the Defendants' trial, the following evidence was presented: Chad Smith, an agent with the Tennessee Bureau of Investigation ("TBI") testified that the District Attorney's Office asked him in July of 2003 to investigate the victim's disappearance because the victim was an important witness in multiple pending drug cases. The victim had last been seen with Defendants Jarnigan and Smith, so he interviewed them. During that interview, he asked them how they knew the victim and about the last time they had seen the victim. Defendant Smith told him that he had been good friends with the victim but had not seen him for about a week.

Agent Smith testified that Defendant Smith told him that the victim had called Defendant Smith "out of the blue" and wanted to visit. Defendant Smith said that he invited the victim over, and they talked for a while before deciding to go and purchase some beer. Defendant Smith said that they got into the gray van that the victim was driving and went inside a market to buy beer. While inside the market, the victim got into an argument with a Michael Bullington, who was driving a blue Volkswagen. Defendant Smith said that the victim and Bullington argued about the victim being a snitch.

Agent Smith said that Defendant Smith told him that after they left the market they drove toward the victim's house, which is located near a boat access ramp. As they pulled in, they saw Bullington near the ramp in his Volkswagen. The victim and Bullington engaged in a verbal confrontation, after which Bullington drove away. Defendant Smith told the agent that they attempted to follow Bullington, but their van ran out of gasoline. After they went back to the victim's house, switched cars, and picked up the victim's son, they continued to drive around for a while. Defendant Smith said that, as they were driving around, the victim started to slur his speech, and the Defendant noticed the victim "shooting up" drugs. The Defendant, who was driving the victim's car, saw Bullington near Little Shannon Mountain Road. When he stopped the car, the victim jumped out of the car and began chasing Bullington.

The agent testified that Defendant Smith claimed this was the last time that he saw the victim. Defendant Smith went to his sister's house where he called the victim's father, who told him to bring back the car and the victim's son. Defendant Smith told the agent that he could not get the victim's car started again, so he asked his sister to take him and the victim's son to the victim's father's house, where they made arrangements for someone to come later and pick up the victim's car.

The agent asked Defendant Smith where he lived, and the Defendant said that he stayed at different motels located near Exit 4. He said he had used false names, including James Jones, to procure the motel rooms. Defendant Smith also told him that he did not own a gun, but he carried a knife for protection. During this brief second interview, the Defendant attempted to describe the location where he last saw the victim, telling the agent that the victim ran between two trailers located near the intersection of Little Shannon Mountain Road and Jaybird.

Agent Smith went to multiple motels off of Interstate 81 near Exit 4, and he found a room registered to a James Jones at the Crown Inn. He also found that rooms had been rented at the Hillcrest Inn on June 25th and 26th in the name of George Smith and Lee Smith. The agent also confirmed, by reviewing the telephone records of the Defendant's cell phone, that there were calls made between the Defendant's cell phone and the victim's residence before 7:00 a.m. on June 26, 2003, around the time that the victim became missing.

Agent Smith testified that he executed a search warrant for a small trailer where Defendants Smith and Jarnigan had stayed. During the search, the agent placed the two Defendants in the back of a police car outfitted with a device that recorded the conversation between the two. That recording, played for the jury, included the following discussion between the two Defendants relevant to this case:

> [Defendant Jarnigan]: . . . . They know what happened to [the victim] too.
>
> . . . .
>
> [Defendant Smith]: You don't know nothing about [the victim] . . . .
>
> [Defendant Jarnigan]: If you go[,] I'll come bail you out. Okay. Just . . . just say it was yours and I didn't know nothing about it.
>
> [Defendant Smith]: Alright. Come bail me out . . . alright? . . . know nothing about [the victim].
>
> [Defendant Jarnigan]: . . . He said something about you know what happened to [the victim] and something that we're all gonna have a discussion about it. I said I . . . .
>
> . . . .
>
> [Defendant Smith]: Just stick to the story. . . . They'll probably get me for the scales and . . . if they don't find it. Okay. You know all that shit[']s hid over, ones over . . . .
>
> . . . .

[Defendant Smith]: . . . . f**k the dope . . . about [the victim].

[Defendant Jarnigan]: Well I don't know.

[Defendant Smith]: I don't know nothing about [the victim]. I'm just telling the truth I'm gonna tell em [sic] the truth. You know, you know I don't know what happened.

[Defendant Jarnigan]: That one's Chris Smith right there.

[Defendant Smith]: I know. He's homicide.

[Defendant Jarnigan]: He's . . . . you . . .

[Defendant Smith]: The search warrant wasn't for the dope . . . .

. . . .

[Defendant Smith]: I need to read that mother f**king search warrant. . . . didn't show me no [sic] search warrant.

[Defendant Jarnigan]: Ask, holler at dude and ask him.

[Defendant Smith]: I need to, I need to read the search warrant man. F**k that. I ain't [sic] got no gun I ain't [sic] got nothing, nothing here that'll link us. Clothes, shoes, nothing. . . . What I mean is . . . I still go, I, I, I, don't have no [sic] new shoes.

. . . .

[Defendant Smith]: I need to read the search warrant . . . . I want to know if you are searching for f**king evidence due to a homicide or you searching for f**king drugs. What are you searching for?

On the tape, both Defendants discussed the legality of the police action executing the search warrant. They wanted to know what the police sought. Several times, Defendant Smith indicated that he used the scales he had in the house for weighing Defendant Jarnigan's medicine. He said that she sometimes had to take half a pill, and he used the scales to ensure she took precisely half a pill. Defendant Smith told Defendant Jarnigan to tell the police that she did not know anything, and he would do the same, unless they were both charged and then he would "have to say it's mine." Defendant Smith then said he smoked but did not sell the drugs. Later, he expressed concern that perhaps he sold drugs to an undercover police agent. Defendant Smith told Defendant Jarnigan to get him out of jail if he was arrested, and, when she did, he was

"gone."

After listening to the recording and speaking with the Defendant's sister, Agent Smith requested to search Pine Brook Lane in Morristown for items related to the victim's disappearance, such as a gun or bloody clothing. The Agent also searched an area near Hillcrest Inn where a witness saw Defendants Smith and Jarnigan walking with the victim. There, he found a Levis tri-fold wallet containing the victim's identification near a bullet.

Agent Smith spoke with Defendant Smith again, on August 20, 2003, after the Defendant called him and requested that they discuss the search warrant that the agent executed. The agent and Teddy Collingsworth, an investigator from the District Attorney's Office, met with Defendant Smith. Agent Smith asked Defendant Smith to inform Collingsworth about the last time that the Defendant saw the victim. Defendant Smith stated that the victim had called him, and the first time they met was at the Hillcrest Inn. The agent noted that this story differed from what the Defendant had previously told him. Agent Smith confronted Defendant Smith with the discrepancies in the story and then played him the portion of the tape recording made in the police cruiser, in which Defendant Smith discussed a bloody shirt.

Agent Smith testified that Defendant Smith began to cry and told him that he shot the victim. He then provided the agent with a lengthy written statement in which he described how the killing occurred. In the statement, Defendant Smith first stated that he graduated from high school and received an Associates Degree in psychology. The Defendant stated that he requested the meeting with Agent Smith and that he spoke with him voluntarily. Defendant Smith then stated that he had previously incorrectly told the agent that he last saw the victim when the victim jumped from the car that they were riding in together. He said that, around the time of this murder, he was staying at the Super 8 Motel at Exit 8 in Morristown. Defendant Smith said that one day he was at his sister's house when two men came by driving a green Suburban. Neither of them got out of the car, but the driver handed him something wrapped up in a newspaper and told him, "I got something for you. When he gets off the hill, you shoot him. You get dropped off somewhere or you get in the trunk, and then you shoot him." Defendant Smith took the paper, which contained a black pistol. Defendant Smith said that he discussed trying to fake the victim's death, and he tried to give the gun back several times.

Defendant Smith stated that early on the morning of June 26, 2003, the victim called him on his cell phone while Defendant Smith was staying at the Hillcrest Inn at White Pine. After Defendant Smith told the victim where he was staying, the victim said that he would "stop by." When the victim arrived, the victim was "high" and gave Defendant Smith a hockey shirt. The victim suggested that they pick up his car, which was at his house, so they could party all day. Defendant Smith agreed, and, while on the way to the victim's house, they stopped at a market where the victim got into an argument with a man named Michael Bullington. They then drove back to the victim's house where they saw Bullington again, and the victim got out and ran after Bullington throwing rocks at him.

Defendant Smith further stated that at the victim's house they got another car and picked

up the victim's son, who fell asleep in the car. They went back to the motel, and the phone rang about five minutes later. The caller asked if the victim was there and then said to keep him there. As soon as the Defendant hung up the phone, someone came to the door with an "eight-ball" of cocaine, which was half powder and half hard. The person delivering the cocaine said that Defendant Smith did not "owe" for it. After this delivery, Defendant Smith and the victim proceeded to get "high."

Defendant Smith said that the victim revealed that he believed that people wanted to kill him because his court date was approaching. Defendant Smith showed the victim his gun to ease his mind that Smith would not let anybody get the victim. The two went outside behind the motel, and the victim said that he needed to go to the bathroom. He and the Defendant walked toward a water tower located behind the motel. They then both urinated while standing back-to-back. Defendant Smith said that, while the victim urinated, the Defendant pointed the gun at the back of the victim's head. In describing this moment, he said:

> I was thinking about how I needed money to get my license and a place to stay. A lot of other things ran through my mind about how I needed clothes, and how I didn't want to sell drugs anymore. I then was convicted by God that I shouldn't shoot [the victim]. I lowered the gun and the gun went off as I was lowering it.

The Defendant stated that he was scared and ran back to the motel. He took the victim's son, still asleep in the car, back to the victim's father's house. Later, he threw his clothes in a dumpster. Two days after this incident, he remembered that he left at the scene a beer bottle that he had been carrying when he shot the victim. He drove himself back to the place where he shot the victim, picked up the bottle, and saw that the victim had maggots around his eye. He covered the victim with some grass from the open field and threw the beer bottle in the dumpster. The Defendant expressed remorse for this killing.

After giving this statement, Defendant Smith agreed to allow Agent Smith to intercept conversations between Defendant Smith and Defendant Allen. Defendant Smith also went back to the murder scene with the agents. Additionally, Defendant Smith took the agents from the Hillcrest Inn to Roe Junction, where he had thrown out the pistol. Defendant Smith also took Agent Smith to the Super 8 Motel where he said that he had stayed the night of the murder. He pointed out the dumpster where he disposed of his bloody clothing.

Agent Smith identified a tape recording of a conversation between Defendant Smith and Defendant Allen that occurred while Defendant Smith was wired by the police. In that recording, Defendant Allen asked Defendant Smith if he "is police now." Defendant Smith said "no," and Defendant Allen asked why Defendant Smith came to his house. Defendant Smith then said that he was getting ready to leave, and he needed to talk to Defendant Allen about a private matter. Defendant Allen expressed concern that the police were watching his house and would come for him any day. Defendant Smith told Defendant Allen not to tell anyone anything, and Defendant Allen said that everyone in the town knew what had been done.

Defendant Allen then said, "[W]hat I told you the other night I was not lying to you and I told you what to tell him and then you all pull into my house . . . ." The two arranged to speak later while Defendant Smith was at his house in White Pine.

During the later conversation, Defendant Smith told Defendant Allen that he "need[ed] to know man if it's cool with dude before I leave." Defendant Allen told him that a man, later identified as Mike Brassfield[1], was with Defendant Allen and "it's cool." Defendant Smith asks to speak with Brassfield, and Defendant Allen states, "he's drunk, he's singing and everything[;] he's real drunk." Brassfield then got on the phone, and Defendant Smith told Brassfield that Defendant Smith was preparing to leave town. He asks Brassfield, "is that taken care of," and Brassfield guaranteed that "it" was. Defendant Smith asked, "[I]s it in the ground or what?" Brassfield responded, "hey, you saved my brother's life."

On August 27, 2003, the Sheriff's Department told Agent Smith about skeletal remains were found on River Road. The remains were scattered over the hillside, so the agent called the University of Tennessee Anthropology Department to come and help them recover the remains. The agent testified that he found a skull with a hole, consistent with a bullet hole, in the back. Portions of the remains led them to 1441 River Road, which was 300 yards from the original search sight. Agent Smith noted the considerable distance between where police found the body and where, according to Defendant Smith, the murder occurred,. The location where Defendant Smith indicated the murder had occurred was in Jefferson County, but the body was found in Hamblen County. The agent also received blue jeans and other bones gathered from the remains site. Additionally, he received a blood sample from the victim's sister. He sent the jeans, bones, and blood to the TBI laboratory for DNA comparison.

Agent Smith said that he also interviewed Defendant Jarnigan as part of this investigation, and she gave a statement in which she discussed, among other things, the gun used to shoot the victim. In that statement, she provided information about a gun in the Roe Junction area. She drew a diagram of where the gun was located. Defendant Jarnigan admitted in the statement that she previously lied about the last time that she saw the victim. She revealed that the last time she saw him was at the Hillcrest Inn, when the victim showed up at the motel room that she had rented. He started using cocaine, and, shortly thereafter, Darrell Horton[2] came to the hotel room with more cocaine. About an hour later, Michael Bullington showed up in a Suburban and came inside with about two eight-balls of crack and a couple of morphine pills. Bullington left, and the victim continued using cocaine and drinking beer.

In her statement, Defendant Jarnigan said that she left the motel with the victim in his van at around 5:00 p.m. They stopped at a market where the victim got into an argument with

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[1]Mike Brassfield is refereed to as "Mike B" in the transcript, but he later testified at trial, and his full name is Mike Brassfield. He is Defendant Allen's brother.

[2]Darrell Horton did not testify in this case, but he is the subject of one of the Defendants' issues related to allegedly false statements made by a juror.

Michael Bullington after Bullington called him a snitch. They left and ran out of gas near a boat dock by the victim's house. The victim got some gas from his house, they all got into the victim's Oldsmobile, and picked up the victim's son. The group drove back to the motel, and they left the victim's son asleep in the car while they went inside the motel.

Defendant Jarnigan said that she had spoken with her friend Renee Simpson a couple of times during the day of these events to plan a trip to the store. When she returned to the motel room with the victim, the victim began using drugs again, and she called Simpson. Simpson picked up Defendant Jarnigan at around 7:30 or 8:00 p.m., and they went to three grocery stores where Defendant Jarnigan said she used her food stamp card and spent around $150.00. Simpson and Defendant Jarnigan returned to the motel, where she saw the victim's son still asleep in the car. She said that she went into her room, Defendant Smith's sister arrived, and they took the victim's son home. Defendant Jarnigan said that she did not know what happened to the victim but that she heard several people bragging that they killed him. She said she never asked anyone for money as a result of killing the victim.

Defendant Jarnigan also provided the agent with a map that depicted where he could find the gun. On December 17, 2003, the police found a .380 high point semi-automatic pistol with a laser sight and a clip or magazine in the area described by Defendant Jarnigan.

On cross-examination, Agent Smith testified he did not recall whether Defendant Smith told him that the shooting was accidental. Agent Smith reviewed the tape again and recalled that the defendant told him that "after I changed my mind and [the gun] went off," referring to the shooting. He agreed that the Defendant told him that he panicked after the shooting and left several things behind.

Richard Carr, with the Department of Human Services, testified as the keeper of records for the food stamps program called Families First. He determined that, in June of 2003, Defendant Jarnigan received such benefits. Carr testified that he could track when any individual used their food stamp card, and each transaction showed the date, time, amount of the transaction, and the balance of the benefits. Carr testified that if Defendant Jarnigan used her E.B.T. account, his records would reflect that use. In fact, she had an eight-cent balance as of June 26, 2003, with the last transaction shown on June 7, 2003, at the West Side Market at 7:55 p.m.

Todd Davidson, a detective with the Morristown Police Department, testified that he worked as a detective in February and March of 2001, and his department employed the victim as a confidential informant. During the course of his investigations, the victim and Defendant Allen contacted each other multiple times. As a result of these contacts, the grand jury indicted Defendant Allen, and the victim was listed as a witness against Defendant Allen. Detective Davidson unsuccessfully attempted to locate the victim in June 2003, which resulted in a dismissal of the case against Defendant Allen. On cross-examination, Detective Davidson agreed that the victim was a witness against approximately forty defendants as a result of his investigation. After the victim disappeared, all of the cases were dismissed. The detective

testified that both the victim and the victim's wife were paid confidential informants. The victim's wife died on March 15, 2004, before she could testify in any of the cases.

Kathy Mullins, the Circuit Court Clerk for Hamblen County, testified that case number 03-CD-046, in which Defendant Allen was the Defendant, listed the victim as a witness, and the case was dismissed on July 18, 2003.

Richard Turner, the custodian of the telephone records for Bellsouth, identified a phone number listed in the victim's name and stated that the address associated with the number was in Morristown, Tennessee. More specifically, Turner testified about a three-minute call made from the victim's phone to another number, 423-312-3439, at 6:48 a.m. On June 26, 2003, the victim's phone received a call, one minute in duration, from the 3439 number at 6:52 a.m.

The State called several employees from the motels involved in this investigation. Lynne Killian, record keeper for the Super 8 Motel located on East Andrew Johnson Highway, testified that a "George Smith," who listed his address as in Morristown, checked into the motel sometime after midnight on June 26, 2003. Mike Patel, an employee of the Crown Inn at Exit 4 in White Pine, said that a person by the name of "James A. Jones" registered at the motel on June 28. On July 11, a person named "Clyde Capps" checked in using the license of "Patty Diamond." Dorris Taylor, a Hillcrest Inn employee in June of 2003, said that, on June 25, 2003, Defendant Smith filled out a registration card and was assigned room 227. He provided his address as 99 Pine Cone Drive, Whitesburg, Tennessee. On June 26, 2003, a "Lee Smith" checked in, and she assigned him room 227. He checked out on June 27, 2003. Taylor identified another registration card filled out by "Lynn Atkins" on June 25, 2003, which listed her address 1995 Liberty Hill, Lot number 21, Morristown, Tennessee. She was assigned room 209. Taylor noted that both Smith and Atkins were registered on June 25, 2003. On cross-examination, Taylor testified that there were ten rooms registered that evening, and she had no way of knowing how many people stayed in each of the rooms.

Robert Dwayne Rucker testified he was incarcerated for his prior convictions for forgery, theft, and the sale of cocaine. In June 2003, Defendant Allen approached him, and the two discussed that Defendant Allen wanted to pay twenty thousand dollars to have the victim killed. According to Rucker, Defendant Allen wanted the victim killed for being an informant and because he "had him on an indictment and [Defendant Allen] didn't want to go back to prison. He was out on parole." Rucker said that Defendant Allen was supposed to contact him about killing the victim, but never did. In July 2003, Rucker saw Defendant Allen, who said that his lawyer got the charges against the Defendant dropped. When Rucker inquired further, Defendant Allen said that he "took care of the problem," which Rucker took to mean that he had "taken care of" the victim. Rucker testified that he worked with the Tennessee Highway Patrol ("THP") during the time of these events as an agent.

On cross-examination, Rucker testified he worked for the THP since the end of 2002, and THP paid him cash for his services. Rucker agreed that he failed to report to the IRS his THP income and his income from a construction job. Rucker said that, immediately after Defendant

Allen asked him to kill the victim, he informed the THP of this, and he made this report before the victim's disappearance. Rucker said that he knew of the victim, but chose not to approach the victim with this information because he did not know the victim "that well" and did not know where the victim lived.

Phyllis West testified that she had previously been convicted of theft of property over $500 and received a four-year sentence. She said that Danielle "Sissy" Epps introduced her to Defendants Smith and Jarnigan on June 21, 2003, at Defendant Smith's sister's house. On June 22, 2003, when West was riding in a car with Epps and Defendant Smith, she overheard Defendant Smith tell Epps that he wanted Epps to help him kill the victim. Defendant Smith said that he wanted Epps to "lure [the victim] out." West drove to where the victim lived, and Epps went inside the house and got the victim to agree to let her come back and talk to him.

West testified that, the following day, Epps picked up West and Defendant Smith, and West rented a motel room in Morristown, where Defendant Allen brought her a tape recorder and some crack cocaine. Defendant Allen instructed Epps to visit the victim and try to get him high and tape record him. West said that Epps left the motel room and returned later with the tape recorder. Although she could not recall the exact date, West testified about a time when she was at Defendant Smith's house and saw Defendant Allen driving his blue Cadillac. She said she was talking to Defendant Smith at an abandoned factory, when he had to meet someone to pick up some money. West saw a blue Cadillac pull into the driveway. The following day, Defendant Smith bought an old white Mercedes.

West said that, on Tuesday, June 24, 2003, she and Epps went to the Days Inn Motel, and Epps paid for their room. The following day, she and Epps got a room at the Hillcrest Inn in White Pine. Later, Epps picked up Defendants Smith and Jarnigan, who rented a separate room at the same motel. Defendant Allen and a man named Darrell[3] came to the room later with a black pistol. On the morning of June 26, when West arrived back at the motel to get some of her things, Defendant Smith told her that she could not get her things because the victim was on his way to the motel. West testified that, later, on June 28, 2003, Defendant Smith told West that he was "sorry but he had to do it," and she asked, "What?" Defendant Smith responded, "We were in the woods but he didn't feel a thing, he was high."

On cross-examination, West agreed that she smoked crack cocaine three to four times per day each day during this time period. She admitted arrests in August of 2003 for violating her probation and for theft of property valued over $500 and explained that these charges were related to her drug use.

Danielle Lynne Epps testified that the State charged her in this case with first degree murder, alleging that she aided and abetted the Defendants in committing the victim's murder.

[3]It appears from later testimony that West is referring to "Darrell Horton," who is the subject of one of the Defendants' issues on appeal.

She testified she had reached a plea agreement with the State whereby she would plead guilty to attempt to facilitate first degree murder and testify truthfully at the Defendants' trial in exchange for the State's recommendation of an eight-year probationary sentence.

Epps described Defendant Allen as her friend, and said Defendant Allen introduced her to Defendant Smith at the College Square Apartments in Morristown. He told her at the time of the introduction that Defendant Smith "was the one that was going to take [the victim] out." Epps recalled another time when she heard West and Defendant Smith discuss that Defendant Smith would kill the victim.

Epps said that, on June 24, 2003, she stayed at the Super 8 Motel with Defendant Smith and West. Defendant Allen made the statement that whoever "got" the victim first would get paid, but he did not disclose the amount. Defendant Smith said that he was either going to shoot the victim or get him "messed up on drugs." Epps left and went to a friend's house where she used the phone to page Defendant Allen. She asked Defendant Allen if she could go to his house to purchase some drugs. He said to call him back later because he just gave all of his drugs to Defendant Jarnigan. Defendant Allen said that Defendant Jarnigan took the drugs and asked for some rubber gloves and a piece of plastic or paper, and told him that they getting ready to "do" the victim.

Epps testified that she met Defendant Allen to purchase drugs, and he handed her more drugs than she purchased and told her to drop them off with Defendant Smith at the motel. Epps testified that, when she dropped off the drugs, she said to the victim, "If you love your children you'll go home," and the victim said "Well, I'm sitting here partying right now." As she was leaving, she saw Defendant Jarnigan.

Epps said that she and her friend went back to her friend's house, where she called Defendant Smith's room and asked to speak with the victim. She asked the victim again to go home and told him that she would take him home. He told her "no" because he was "partying" and hung up the phone. She said that, at the time, she knew what was going to happen to the victim, but she did not say anything because Both Defendants Smith and Allen had threatened to "take[]" her "out" if she crossed them.

Connie D. Lawson, Defendant Smith's sister, testified that she grew up with Defendant Allen. She also knew Defendant Jarnigan as her brother's girlfriend. Lawson testified that, in 2003, both Defendant Jarnigan and Smith lived with her. While they lived with her, she saw Defendant Smith with a black pistol wrapped in a white towel. She said that the pistol was loaded with a clip, had a laser, and she saw Defendant Smith fire the pistol while he was at her house.

Lawson testified that, on June 26, 2003, she saw Defendant Jarnigan when she picked her up at the Hillcrest Inn and took her to the Family Dollar, where Defendant Jarnigan purchased some clothing. When she picked her up, she saw Defendant Smith and the victim in the same motel room. After she and Defendant Jarnigan returned from shopping, and while Lawson was

leaving, she saw the victim, Defendant Smith, and Defendant Jarnigan all walking from the motel room toward a wooded area in the back.

Lawson testified that later that evening she saw Defendant Smith at their mother's house, and he asked her to give him a ride. She gave a ride to Defendant Smith, Defendant Jarnigan, and a little red haired boy, taking them to the boy's house. Lawson then dropped Defendants Smith and Jarnigan at the Super 8 Motel. The next day, she saw Defendants Smith and Jarnigan wearing the clothes that Defendant Jarnigan purchased the previous day. Defendant Jarnigan had with her two blue Food City bags, both tied at the top. Lawson testified that she saw the two Defendants again the following day at her house, and they no longer had the blue bags.

Lawson testified that she talked with Defendant Smith while they were at her house and that Defendant Smith was crying "really hard." He told her that he had shot the victim in the back of the head. Defendant Jarnigan, who was also in the room, said, "We killed him execution style." Lawson said that the Defendant told her that he was urinating in the woods and turned around and shot the victim in the back of the head. Later, Defendant Smith also told Lawson that the victim's hair flew into Defendant Smith's mouth when he shot him. Defendant Smith also told her that he had moved the victim's body and that it looked like dogs had been eating the body.

Lawson testified that, a few weeks later, she gave Defendant Jarnigan a ride to the Roe Junction community. On the way back, Defendant Jarnigan indicated a spot where the Defendants had thrown "evidence out." Lawson said that she told Defendant Jarnigan that she was crazy, and Defendant Jarnigan said, "Yes, I am crazy[,] and I've got papers from Lakeshore and I can get away with anything."

Lawson said that, sometime later, she and Defendant Smith got into an argument. Her brother said that "he could get fifty years or life" because Lawson "knew too much."

On cross-examination, Lawson testified that she refused to speak with the Defendants' lawyers in preparation for this case because she had been threatened and did not know who to trust. Lawson conceded that the State's attorney told her not to speak with the Defendants' attorneys. Lawson agreed that she had previously been convicted in 1999 of misdemeanor forgery and in 2002 of criminal impersonation. She said that she violated her probation for criminal impersonation and had to serve three months in jail. Lawson said that she did not call the police after her brother and Defendant Jarnigan confessed because she did not believe what he said.

Michael Lynn Brassfield, Defendant Allen's brother, testified that he knew Defendants Smith and Jarnigan. At the time of trial, Brassfield testified he was serving a sentence for breaking and entering and that the State's attorney visited him in jail. Brassfield testified that the State made an agreement with him whereby he pled guilty to accessory after the fact of first degree murder in exchange for a one-year sentence that would run concurrently with his current sentence.

Brassfield testified about the events surrounding this case and said that he went to the Super 8 Motel in Morristown where he saw Defendants Allen and Smith, Richard Atkins, and a girl named "Sissy."[4] While in the motel room, Defendant Allen mentioned two "Mexicans [who] had twenty-five thousand dollars on [the victim's] head." Brassfield recalled another incident around the same period of time when he was at a Days Inn in White Pine with Defendants Allen and Smith, West, and "Sissy." While there, Defendant Allen asked Brassfield and Defendant Smith to go to the bathroom with them, and he mentioned again about the two Mexicans who offered money in exchange for killing the victim. Defendant Allen said that, if someone killed the victim, he would ensure they were paid. Defendant Allen said that he wanted the victim killed because the victim "had indictments on him." Brassfield agreed to kill the victim but could not get him off the hill.[5]

After Brassfield told Defendant Allen that he could not get the victim off the hill, Defendant Smith agreed that he would kill the victim. Brassfield then asked Defendant Allen to walk outside with him, where he told Defendant Allen that if Defendant Smith could get the victim off the hill then Brassfield would kill the victim. Sometime later, at Defendant Allen's apartment, Defendant Allen told Brassfield that he could not get anyone to kill the victim, and he was going to have to take his case to trial. A day or so later, Brassfield brought up the victim's name, and Defendant Allen told him that he had heard that the victim was "laying [sic] in White Pine with a hole in his head."

Brassfield testified that, about four days after the motel meeting, Defendant Allen told him that he was giving Defendant Smith drugs, and Defendant Smith and the victim were probably doing the drugs together. Defendant Allen was not sure whether the victim was dead, so he wanted Brassfield to go and to see the victim's body. Brassfield went to the motel, and Defendant Smith told him that he would show Brassfield the body. Brassfield said that he did not want to see it, in part because the victim had been missing for four days, and Brassfield was sure that Defendant Smith had killed the victim. Brassfield waited at the motel for a while, and then he left with his girlfriend, Cynthia Renee. Renee told him something that indicated that she knew about the murder. Brassfield went back to the motel to confront Defendant Smith about telling Renee about the murder. Defendant Smith then asked what he needed to do, and Brassfield said that they would have to move the body so that Renee would not know its location.

Brassfield said that he and Renee purchased a shovel and then returned to the motel. Then he and Defendant Smith retrieved the victim's body, which was behind the Hillcrest Inn. They put the body in Renee's truck, and then threw it into a hayfield on River Road. Brassfield said that he owed Defendant Allen $600, and Defendant Allen forgave the debt in exchange for Brassfield's actions. Further, Defendant Allen provided Brassfield drugs "about every day."

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[4]We note that Epps was referred to as "Sissy" during her trial testimony.

[5]It is apparent from reading the transcript that the victim was not in the habit of leaving his house, perhaps fearing for his life. Where he lived is referred to as "the hill" by many of the witnesses.

Brassfield said Defendant Allen also gave him eight thousand dollars and two ounces of dope, with instructions to give it to Defendant Smith at the Crown Inn. Brassfield brought Defendant Smith the money and drugs, worth a total of ten thousand dollars, and told Defendant Smith that Defendant Allen would get the rest of "it" to him next week. Defendant Allen contacted him a week later and told him to take Defendant Smith another eight thousand dollars and two ounces of drugs, which Brassfield did. Brassfield told Defendant Smith that Defendant Allen said that they were "even."

Brassfield testified that he told Defendant Allen that he had buried the body, which was a lie. Brassfield said that, since the time of these events, he and Defendant Allen had argued and the Defendant hit him with a "ball bat." Brassfield said that he had been incarcerated since that night. After he was incarcerated, he began to fear for his girlfriend Renee and her children. In an attempt to get Renee taken into protective custody, he showed law enforcement where he had put the body.

On cross-examination, Brassfield agreed that, in accordance with his deal with the State, he would serve no additional jail time to his sentence for aggravated burglary. Brassfield testified that he was not present when the victim was killed. Brassfield said he did not mention that Defendant Smith helped him move the body when he first spoke to law enforcement but told them that another man helped him. Brassfield agreed that he omitted from his original statement mention that he gave Defendant Smith $16,000 and eight ounces of drugs from Defendant Allen. He explained this omission by stating that he did not want his brother, Defendant Allen, involved. Brassfield testified that he had had a life-long struggle with drug addiction and that he has used a lot of crack cocaine. Brassfield said that, around the time of this killing, he used drugs every day all day even though he was on probation. Brassfield said that he was afraid of the victim. Brassfield denied that his girlfriend was with him when he moved the victim's body but said that she was with him when he washed out the truck. Brassfield testified that Defendant Allen told him that Defendant Allen had to "pull a gun" on Defendant Smith because Defendant Smith kept asking for more money for killing the victim.

Chad Mullins, a sergeant with the Hamblen County Sheriff's Department, testified that he received a message in August 2003 from Brassfield. Brassfield told Sergeant Mullins that, if the sergeant kept Brassfield's family safe, he would take the sergeant to the victim's body. A few days later, Brassfield took him to the body. Sergeant Mullins agreed that Brassfield told him that "another man" helped Brassfield move the body, and Brassfield did not mention Defendant Smith.

Tim Johnson testified that he was, at the time of trial, incarcerated in the Hancock County Jail, and he was previously incarcerated in the Jefferson County Jail. The State's attorney met with Johnson in jail, and they agreed that, if Johnson helped the State's attorney with this case, the State's attorney would tell the Jefferson County Prosecutor that Johnson had done so. Johnson recalled that, around the second week of July 2003, he rented a room at the Crown Inn and registered it in his mother's name, Patty Diamond. He said that, at the motel, he saw Defendant Smith smoking crack and heard him say that he had to kill the victim. Defendant

Smith told Johnson that he shot the victim once in the back of the head, and indicated that he got $10,000 to do the job. Defendant Smith pointed to the water tower behind the Crown Inn and said that the body was lying over there. Defendant Smith told him that the victim's skull was gone and maggots were crawling out of it. Defendant Smith then offered Johnson $5,000 to burn the body and bring Defendant Smith the head. Johnson saw that Defendant Smith had a large "wad" of money. On cross-examination, Johnson agreed that he gave a statement to Agent Smith, in which he did not mention that he was offered $5,000 to burn the victim's body.

Kristopher Jarnigan testified that he is Defendant Jarnigan's brother, and he knew Defendant Smith. He said that, in the summer of 2003, Defendant Jarnigan contacted him trying to obtain a gun. She also asked Jarnigan's father and brother for a gun. Jarnigan testified that, around that time, he took Defendant Smith to Defendant Allen's house in Morristown to get crack cocaine that Defendant Allen was paying Defendant Smith for the victim's murder. Defendant Smith told Jarnigan that he shot the victim in the back of the head for $10,000. On cross-examination, Jarnigan said that he faces prescription fraud and an aggravated robbery charge. He hoped testifying would cause the State to drop the charge.

John Stacy Lovell testified that, in December of 2003 and January of 2004, he was employed at a Shell station. He said that he has known Defendant Smith all his life and that Defendant Smith came into the Shell station where he worked, and the two were joking with each other. Lovell said that Defendant Smith went from being happy to being sad and told Lovell that he had to tell Lovell something. Defendant Smith reached up and whispered in Lovell's ear that he killed the victim. Lovell then played a video surveillance tape from the evening when Defendant Smith came into the Shell station that showed Defendant Smith leaning over the counter towards him. On cross-examination, Lovell agreed that Defendant Smith appeared intoxicated. He also agreed that he told the Defendant that he did not blame him and that he loved him. He said that Defendant Smith said that he killed the victim because he snitched "out Stanley Davis and his old lady." Lovell agreed that Defendant Smith never mentioned Defendant Jarnigan.

Rick Harmon, a detective with the Hamblen-Morristown Multiple Crimes Unit, testified that he brought a metal detector to the vicinity of the Hillcrest Inn and searched for a shell casing. There, he found a bullet that he gave to Agent Smith. Detective Harmon also found a spent casing from a gun that had been fired off the North side of the front porch at 611 King Avenue. Detective Harmon searched the location where the victim's body was found and the location where the police determined the victim had been shot. He found another shell casing several feet from where he was told that the victim fell when he was shot. He contacted Agent Smith, who actually retrieved the casing.

Dan Cox, a lieutenant with the Morristown Police Department, testified that he went to the Roe Junction area to look for the weapon involved in this case. He found a weapon in a creek.

Don Carmon, a special agent with the TBI, testified that he received in this case the

bullet from the crime scene and a pistol. Agent Carmon determined that the bullet recovered had the same rifling profile as the pistol that he examined. He could not, however, determine anything by comparing a bullet that he fired from the pistol with the bullet submitted because the barrel of the pistol was corroded. Therefore, he could not be sure that the bullet was fired from the pistol. Agent Carmon testified that he did, however, determine that the two shell casings in this case, one found at 611 King Avenue and the other from the crime scene, were fired by the same pistol. He again could not be sure whether that pistol was the pistol submitted in this case.

Dr. Lea M. Jantz, a forensic anthropologist with the University of Tennessee, testified that she assisted in recovering and analyzing the human remains in this case. She and her team located remains at the site and flagged them. They found a skull, hand bones, rib, and some vertebrae. Dr. Jantz said that, from the bones, she determined that animals had access to these remains and probably were the cause of the large scattering of this site and these remains. Dr. Jantz also examined the place where the victim was shot. She said that the body appeared to have decomposed primarily at that site. Dr. Jantz's team estimated that the remains belonged to a white male between the ages of twenty-five and thirty-five. He had limited dental work and suffered anti-mortem trauma. The doctor took a small section of bone for DNA testing.

Brent Murphy, a crime scene investigator with the Morristown City Police Department in August 2003, testified that he helped recover bones where the victim's remains were found. He said that he also recovered a pair of bloody blue jeans and retrieved a bone from one of the pant legs. He packaged the bone and blue jeans and sent them to the TBI.

Donna Purkey, the victim's older sister, testified that she gave Agent Smith a blood sample to compare DNA between her brother and the remains, for identification purposes.

Chad D. Johnson, a special agent forensic scientist with the TBI, testified that he conducted tests on the bone that was sent to him from the Morristown Police Department and on the blood sample submitted by the victim's sister. He determined that the bone needed mitochondrial DNA testing, and he sent the bone and the blood to ReliaGene Laboratory for testing.

Gina Pineda from ReliaGene Technologies testified that her laboratory obtained a DNA profile from both the bone and the blood sample in this case. The bone in this case produced a mitochondrial profile consistent with the victim's sister's profile.

Defendant Allen called to testify Stephanie Schaeffer, who testified that she knew Phyllis West well, as the two had been incarcerated together for about ten months. Schaeffer said that West discussed with her frequently the victim's murder but never mentioned Defendant Allen's name. Schaeffer stated that she dated Brassfield for approximately two and a half or three years, but they broke up before the victim's death. Schaeffer testified that Brassfield has a reputation as an untruthful person in the community.

Bronson Hollifield testified that he has known Defendant Allen for approximately six or

seven years, and, previously, he worked for the Defendant's concrete business. Hollifield said he was present at the market when Defendant Allen saw Rucker, and Defendant Allen did not solicit anyone to kill the victim.

Based upon this evidence, the jury convicted each Defendant of one count of first degree premeditated murder.

II. Analysis

On appeal, the Defendants contend the following: (1) the evidence is insufficient to sustain their convictions; (2) the evidence is insufficient to sustain the jury's finding that Hamblen County was a proper venue for this case; (3) the trial court erred when it denied the Defendants' motion for change of venue; (4) the trial court erred when it consolidated the Defendants' cases for trial; (5) the trial court improperly accepted the State's peremptory challenges of two potential jurors; (6) the trial court improperly allowed a juror to remain on the panel when the juror should had been disqualified for actual bias or prejudice; (7) the trial court improperly admitted an audio recording of a conversation between Defendants Smith and Jarnigan; and (8) the trial court improperly admitted evidence about Allen's prior criminal charge for delivery of cocaine.

A. Sufficiency of the Evidence

All the Defendants on appeal contend that the evidence is insufficient to sustain their convictions. Defendant Allen asserts that the evidence is insufficient to sustain his conviction, criminal responsibility for first degree murder, because the State did not prove that he participated in, assisted, or was responsible for this killing. He then questions the credibility of many of the State's witnesses. Finally, Defendant Allen asserts that the State did not offer medical proof establishing the cause or time of death; therefore, the State did not prove that a killing took place. Defendant Smith contends that the State failed to prove that the killing was intentional or premeditated. Defendant Smith asserts that the gun went off accidentally and that the State did not present evidence that refuted this claim. Further, Defendant Smith contends that the actions of Agent Smith show that Agent Smith did not believe that the Defendant was guilty of intentionally killing the victim. Finally, Defendant Smith questions the credibility of the State's witnesses. Defendant Jarnigan also contends that the State did not prove that a killing took place and did not prove the cause of the victim's death. Defendant Jarnigan asserts that the cause of death could have been a drug overdose and that the victim could have been shot in the head after he had already died.

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e), *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence,

or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." *State v. Smith*, 868 S.W.2d 561, 569 (Tenn. 1993). The jury decides the weight to be given to circumstantial evidence, and "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the jury." *State v. Rice*, 184 S.W.3d 646, 662 (Tenn. 2006) (citations omitted).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 479 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus, the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1996) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

First degree murder is "[a] premeditated and intentional killing of another." T.C.A. § 39-13-202(a)(1) (2003). Tennessee Code Annotated section 39-13-202(d) explains:

> "[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

The presence of premeditation is a question for the jury and may be established by proof of the circumstances surrounding the killing. *Bland*, 958 S.W.2d at 660. Our Supreme Court has noted the following factors that may demonstrate the existence of premeditation: the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, declarations by the defendant of an intent to kill, evidence of procurement of a weapon, preparations before the killing for concealment of the crime, and calmness immediately after the killing. *Id.* Additional factors cited by this court from which a jury may infer premeditation include "planning activities by the appellant prior to the killing, the appellant's prior relationship with the victim, and the nature of the killing." *State v. Halake*, 102 S.W.3d 661, 668 (Tenn. Crim. App. 2001) (citing *State v. Gentry*, 881 S.W.2d 1, 4-5 (Tenn. Crim. App. 1993)). Without sufficient evidence of premeditation, a homicide in Tennessee is presumed to be second degree murder. *State v. Brown*, 836 S.W.2d 530, 543 (Tenn. 1992).

We first address whether the evidence is sufficient to prove that Defendant Smith acted with premeditation when he shot and killed the victim. Defendant Smith told police that he accepted money and drugs in exchange for killing the victim. He was given, and accepted, a pistol to commit this crime. He discussed plans to kill the victim with multiple people, including the victim's ex-girlfriend, whom he believed could lure the victim out of the victim's house. Defendant Smith used drugs with the victim, took the victim on a walk, and then, as they were back to back urinating, he turned and shot the victim, who was unarmed, in the back of the head. Although Defendant Smith claims that he changed his mind at the last second, but the gun fired anyway, the jury rejected this contention.

Further, we conclude that the evidence sufficiently supports that a killing occurred. Not only did Defendant Smith admit to shooting the victim in the back of the head while the victim was still alive and urinating, but he also admitted seeing the victim's body decomposing and being eaten by maggots days after the shooting. A forensic anthropologist testified that remains were found in a location described by a witness who participated in moving the body. Those remains were analyzed by the TBI and determined to have belonged to a relative of the victim's sister. A rational jury could have determined from this evidence that the victim was alive when Defendant Smith shot him and that the shooting caused his death.

Similarly, the evidence is sufficient to support Defendant Allen's conviction for first degree murder under a theory of criminal responsibility. "A person is criminally responsible for an offense committed by the conduct of another if . . . [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense . . . ." T.C.A. § 39-11-402(2) (2003).

Defendant Allen asked Rucker to kill the victim because the victim "had" an indictment on him. Other witnesses testified that Allen wanted the victim killed for "snitching" on Defendant Allen. Defendant Allen offered to ensure that whoever killed the victim would be paid. He asked Rucker, Defendant Smith, and Brassfield to kill the victim. Before the murder,

Defendant Allen indicated that Defendant Smith was the person who was going to kill the victim. He gave Defendant Smith drugs to get the victim high. After the victim was killed, Defendant Allen said that his drug charges had been dismissed because he "took care of the problem." Further, after the killing, Brassfield, Defendant Allen's brother, brought money and drugs worth $10,000 from Defendant Allen to Defendant Smith on two separate occasions. Defendant Allen told Brassfield that he had to threaten Defendant Smith with a gun because Defendant Smith repeatedly requested more money as payment for killing the victim. Defendant Allen questions the credibility of the State's witnesses. That determination, however, rests squarely with the jury. The evidence presented by the State, viewed in the light most favorable to the State, is sufficient to sustain Defendant Allen's conviction.

The evidence also supports Defendant Jarnigan's conviction on the theory of criminal responsibility. Defendant Jarnigan attempted to procure a handgun around the time of this killing. The day before the murder she went to the Family Dollar Store to purchase clothes that she and Defendant Smith wore immediately after the murder. Immediately before the murder, she walked into the woods with Defendant Smith and the victim. She was with Defendant Smith after the murder when Defendant Smith's sister took them and the victim's son to the victim's house. After the killing, she told Lawson, "*We* shot [the victim] execution style." (emphasis added). She also pointed to a spot in Roe Junction and told Defendant Smith's sister that was where she disposed of the murder weapon. Later, she accurately told Agent Smith where the murder weapon could be found. This evidence is sufficient for a rational jury to conclude that Defendant Jarnigan aided Defendant Smith in committing this crime. Further, as previously stated, there was sufficient evidence presented that the victim was, in fact, killed as a result of being shot in the head. The Defendants are not entitled to relief on this issue.

B. Sufficiency of Evidence of Venue

The Defendants contend that the evidence was insufficient to sustain the jury's finding that Hamblen County was a proper venue for this case. The Defendants assert that there was a significant variance between the indictment and the proof entered at trial because the indictment charged that the killing of the victim took place in Hamblen County while the proof at trial showed that the killing took place in Jefferson County.

Our Constitution provides that an accused must be tried in the county in which the crime was committed. Tenn. Const. art. I, § 9; *see also* Tenn. R. Crim. P. 18(a) ("Except as otherwise provided by statue or by these rules, offenses shall be prosecuted in the county where the offense was committed."). "'Proof of venue is necessary to establish the jurisdiction of the court, but it is not an element of any offense and need only be proved by a preponderance of the evidence.'" *State v. Young*, 196 S.W.3d 85, 101 (Tenn. 2006) (quoting *State v. Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990) and citing T.C.A. § 39-11-201(e)). "Venue is a question for the jury and may be proven by circumstantial evidence." *Id.* at 101-02 (internal citations omitted). "Slight evidence" satisfies the State's burden if the evidence is uncontradicted. *State v. Bennett*, 549 S.W.2d 949, 951 (Tenn. 1977). In determining venue, the jury is entitled to draw reasonable inferences from the evidence. *Young*, 196 S.W.3d at 102. Importantly, where different elements

of the same offense are committed in different counties, "the offense may be prosecuted in either county." Tenn. R. Crim. P. 18(b).

In *State v. Young*, the Tennessee Supreme Court addressed an issue similar to the one presently before this Court. 196 S.W.3d at 101-03. In *Young*, the defendant, attempting to avoid apprehension from police, jumped into the victim's car in Shelby County and made the victim move into the passenger's seat while he drove. The victim's body was later found in Fayette County. The defendant was charged with and convicted of with first degree murder in Shelby County. On appeal, he contended that the evidence was insufficient to support that Shelby County was the proper venue because a murder is presumed to have been committed where the body is found. *Id.* at 103. The Tennessee Supreme Court concluded that the "State adduced sufficient proof for the jury to infer that [the d]efendant determined to kill the victim while still in Shelby County and that [the d]efendant thereby committed an element of the offense of premeditated murder while still in Shelby County." *Id.* at 102-03. It concluded, therefore, that "[v]enue in Shelby County for prosecution of the premeditated murder of [the victim] was thereby established." *Id.* at 103.

Similarly, in the case under submission, we conclude that sufficient evidence exists to support that Hamblen County was a proper venue for this prosecution. Defendant Smith agreed to kill the victim while in Hamblen County. He received the murder weapon while at his sister's house, also located in Hamblen County. He fired the murder weapon while he was at her house, and a bullet from the murder weapon was found there. The Defendant discussed how Epps would lure the victim from his home in Hamblen County while they rode around in a car together in Hamblen County. While the actual shooting took place in Jefferson County, the State presented sufficient evidence for the jury to infer that Defendant Smith determined to kill the victim while he was in Hamblen County and that he thereby committed an element of the offense of premeditated murder while in Hamblen County.

There is also sufficient evidence to support the jury's finding that Defendants Allen and Jarnigan aided, solicited, or attempted to aid Defendant Smith in the commission of this offense while in Hamblen County. Defendants Jarnigan and Smith lived together in Hamblen County, and she was present when Defendant Smith received and fired a shot from the murder weapon. Defendant Allen was charged with drug crimes in Hamblen County, where he lived, and he helped to have the victim murdered to avoid those charges. His discussions with Defendant Smith about this crime took place at Defendant Allen's Hamblen County home. This evidence is sufficient to satisfy the State's burden of proving that Defendants Jarnigan and Allen aided, solicited, or attempted to aid Defendant Smith in the commission of this murder while in Hamblen County. Accordingly, the Defendants are not entitled to relief on this issue.

C. Change of Venue

The Defendants contend that the trial court erred when it denied the Defendants' motion for change of venue because of pretrial publicity. The Defendants contend that Hamblen County is a small geographic county where the jurors generally know each other and the publicity was

"significant." Defendant Allen contends that he is well known in the community, and it would be difficult to assure that he had a jury pool not impacted by his reputation, in part because he was convicted in 1999 of drug charges after a jury trial. In support of his contention, Defendant Allen submitted the affidavit of his previous attorney, who swore that he saw newspaper articles about Defendant Allen and this case. The attorney swore further that his previous dealings with the Defendant made apparent that "opinions regarding him vary from very favorable to unfavorable." Further, that "[i]t would be very difficult to assure that [Defendant] Allen had a jury pool which was not impacted by his reputation as such has developed during his long residence in Hamblen County, media and/or association in that large pool of individuals charged by virtue of the activities of [the victim]." Therefore, the Defendants contend, the trial should have been moved.

At the time of this trial, Rule 21 of the Tennessee Rules of Criminal Procedure provided as follows:

> In all criminal prosecutions the venue may be changed upon motion of the defendant, or upon the court's own motion with the consent of the defendant, if it appears to the court that, due to undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had.

Whether to grant a motion for a change of venue lies within the discretion of the trial court, and such a decision will not be overturned on appeal absent a showing of abuse of discretion. *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993). Jurors need not be totally ignorant of the facts and issues involved in a case upon which they are sitting, but they must be able to lay aside their opinions or impressions and render a verdict based upon the evidence presented. *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991). The test is "whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity." *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). This Court has noted that:

> "[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair," and the court may not presume unfairness based solely upon the quantity of publicity "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'"

State v. Crenshaw, 64 S.W.3d 374, 387 (Tenn. Crim. App. 2001) (quoting *Dobbert v. Florida*, 432 U.S. 282, 303 (1977) (quoting *Murphy v. Florida*, 421 U.S. 794, 798 (1975))). The burden of proof is on the defendant to show that the jurors were biased or prejudiced against him. *Id.* at 394; *see also State v. Garland*, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981).

Relevant factors to consider in determining whether to grant a motion for a change of venue include: (1) nature, extent, and timing of pre-trial publicity; (2) nature of publicity as fair or inflammatory; (3) the particular content of the publicity; (4) the degree to which the publicity complained of has permeated the area from which the venire is drawn; (5) the degree to which

the publicity circulated outside the area from which the venire is drawn; (6) the time elapsed from the release of the publicity until the trial; (7) the degree of care exercised in the selection of the jury; (8) the ease or difficulty in selecting the jury; (9) the veniremen's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire; (10) the defendant's utilization of his peremptory challenges; (11) the defendant's utilization of his challenges for cause; (12) the participation by police or by prosecution in the release of publicity; (13) the severity of the offense charged; (14) the absence or presence of threats, demonstrations or other hostility against the defendant; (15) size of the area from which the venire is drawn; (16) affidavits, hearsay, or opinion testimony of witnesses; (17) nature of the verdict returned by the trial jury. *State v. Hoover*, 594 S.W.2d 473, 749 (Tenn. Crim. App. 1979).

Again, as previously stated, the test is "whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity," *Kyger*, 787 S.W.2d at 18-19, and the burden of proof is on the defendant to show that the jurors were biased or prejudiced against him, *Crenshaw*, 64 S.W.3d at 387. None of the Defendants in this case proved that any of the jurors were prejudiced by the pretrial publicity. Defendant Allen makes general assertions that "jurors generally know each other" and that he was convicted of a drug related offense after a trial in 1999, making him well-known to "a petit panel of jurors." However, in the absence of any proof that any juror was prejudiced, we conclude that the trial court did not err when it denied the Defendants's motion to change venue. Accordingly, they are not entitled to relief on this issue.

D. Severance

Defendant Allen contends that the trial court erred when it consolidated his trial with the trial of his co-defendants.[6] Defendant Allen contends that the evidence against Defendant Smith was so overwhelming that Defendant Allen was denied a fair trial. He asserts that he was forced to sit at the same table with Defendant Smith, who was the confessed perpetrator of this crime, but he could not cross-examine Defendant Smith because Defendant Smith did not testify. Defendant Smith contends that he was unable to call both co-defendants in his own defense because of the consolidated trials.

The record reflects that Defendant Allen's case was originally set to be tried separately from the trial for Defendants Smith and Jarnigan, who were being tried together.[7] Because

[6]We note that while Defendants Smith and Allen provided some sparse citations to the record, no meaningful citations were provided, including no citation to the portion of the pretrial hearing devoted to this issue and no citation to the trial court's determination on this issue. While, under these circumstances, this issue is not waived, we encourage counsel to provide these helpful citations.

[7]It appears from the record that Defendant Smith and Defendant Jarnigan were originally going to be tried together and Defendant Allen was going to be tried separately. Defendant Smith filed a motion to sever his case, which the trial court denied. Defendant Allen also filed a motion for severance. It appears, however, that his case was, in fact severed originally. Defendant Allen then requested a continuance, and the State requested that the cases be joined if continued.

Defendant Allen was being tried separately, the trial court stated that there was no problem pursuant to *Bruton v. United States*, 391 U.S. 123 (1968). At a hearing on motions, including the State's oral motion to join the cases and the Defendant's motion for a severance, the State informed the trial court that the witnesses in both cases would be the same. The court then asked the State if it was seeking life without parole or the death penalty in Defendant Allen's case. The State told the court that it was seeking life without parole for each of the three Defendants.

The trial court asked the State if it could redact the statements from Defendants Smith and Jarnigan to use them at a joint trial, telling the State that the statements could not name any other defendant. The court noted that it originally thought that the cases could not be tried together. Defendant Jarnigan' s attorney noted that more redactions to the statements were necessary and that there were "some severe *Bruton* problems." The trial court responded that, if the State were willing to accept the trial court's redactions, then the cases could possibly be tried together. The trial court then meticulously went over each statement to ensure that any mention of a co-defendant was removed. After the redactions, the trial court found that "the cases can be tried together and *Bruton* will not be violated." *See* Tenn. R. Crim. P. 14(c)(1)(B).

A trial court shall grant a pretrial motion to sever if it is "deemed appropriate to promote a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2)(A). Decisions concerning consolidation and severance of offenses pursuant to Rules of Criminal Procedure 8(b), 13, and 14(b)(1) will be reviewed for an abuse of discretion. *State v. Denton*, 149 S.W.3d 1, 12 (Tenn. 2004); *State v. Toliver*, 117 S.W.3d 216, 231 (Tenn. 2003). An abuse of discretion in this context implies that the trial court applied an incorrect legal standard or reached a decision against logic or reasoning which caused an injustice to the complaining party. *Spicer v. State*, 12 S.W.3d 438, 443 (Tenn. 2000); *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). This Court has held that "where a motion for severance has been denied, the test to be applied by this [C]ourt in determining whether the trial court abused its discretion is whether the defendant was 'clearly prejudiced' in his defense as a result of being tried with his c[o-]defendant." *State v. Price*, 46 S.W.3d 785, 803 (Tenn. Crim. App. 2000) *(quoting State v. Burton*, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988)).

Joinder is permissible when each defendant "is charged with accountability for each offense included." Tenn. R. Crim. P. 8(c)(1). However, the trial court may grant a severance prior to trial if it is necessary "to promote a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2)(A) & (B). Here, each of the Defendants was charged with accountability for the victim's murder. Therefore, consolidation of the Defendants' cases was permissible and within the sound discretion of the trial court unless consolidation violates constitutional provisions articulated in *Bruton v. United States*, 391 U.S. 123 (1968).

In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court held that where two defendants are jointly tried, admission of one defendant's pre-trial statement implicating the co-defendant violates the co-defendant's Sixth Amendment right to confront and cross-examine witnesses against him. *Id.* at 136-37. This ruling is based on the

acknowledgment that "admission of a co-defendant's confession implicating a defendant in a joint trial constitutes prejudicial error even though the trial court may give clear, concise and understandable instructions that confessions could only be used against a co-defendant and must be disregarded with respect to the nonconfessing defendant." *State v. Bailey*, 865 S.W.2d 7, 9 (Tenn. 1993). Cases since *Bruton* clairfy, however, that the rule in *Bruton* does not apply to confessions that do not implicate the nonconfessing defendant and that *Bruton* does not apply to confessions from which all references to the nonconfessing defendant have been effectively deleted, provided that, as redacted, the confession will not prejudice the confessing defendant. *See Richardson v. Marsh*, 481 U.S. 200 (1987) (holding that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name but, any reference to her existence"); *State v. Person*, 781 S.W.2d 868, 873-74 (Tenn. Crim. App. 1989) (holding that redacted statements satisfied the requirements of *Bruton* and, while trial court erred by not giving proper limiting instruction, such failure was harmless); *State v. Marcus Anthony Robinson*, No. 03-C01-9512-CR-00410, 1997 WL 396241, at *2-3 (Tenn. Crim. App., at Knoxville, July 16, 1997) (holding that the trial court did not err when it refused to sever appellant's case from co-defendant's case because references to appellant in co-defendant's statement were completely deleted and nothing implicated the appellant), *no perm. app. filed*; *State v. Tim Denton*, No. 168, 1992 WL 24058, at *6 (Tenn. Crim. App., at Knoxville, Feb. 12, 1992) (holding that defendant's statement, which was redacted to remove all references to co-defendant was not prejudicial to co-defendant), *perm. app. denied* (Tenn. June 22, 1992). *But see White v. State*, 497 S.W.2d 751 (Tenn. Crim. App. 1973) (holding that redaction of Johnson's name from White's confession with the insertion of "the other person" was not sufficient to avoid a *Bruton* violation and reversing Johnson's conviction on those grounds).

In the case under submission, we have carefully reviewed the out-of-court statements of both Defendants Smith and Jarnigan. We conclude that the trial court did not abuse its discretion when it consolidated the Defendants' cases for trial. The trial court redacted from the statements of Defendant Smith and Defendant Jarnigan any mention of any other defendant. We conclude, therefore, that the Defendants' constitutional confrontation rights were not violated. Thus, severance was not needed to "promote a fair determination of the guilt or innocence of one or more defendants." Tenn. R. Crim. P. 14(c)(2). Accordingly, they are not entitled to relief on this issue.

E. Peremptory Challenges

The Defendants next contend that the State improperly used two of its peremptory challenges to exclude two potential jurors, one of Taiwanese descent and the other of Hispanic descent. Defense counsel objected to the exclusion of the jurors as being volative of *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that peremptory challenges may not be exercised in a discriminatory manner). The trial court concluded that the State's reasons for exercising peremptory challenges against the two potential jurors were sufficiently race-neutral.

The United States Supreme Court has consistently recognized that racially-based juror

exclusions affect and injure the integrity of the justice system. *See Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 902 (Tenn. 1996) (citation omitted). Accordingly, in *Batson*, the Court held that the equal protection clause of the Fourteenth Amendment prevents a prosecutor from using peremptory strikes to challenge potential jurors "solely on account of their race." *Batson*, 476 U.S. at 89.

Batson provides a three step process for the evaluation of racial discrimination claims in jury selection. First, the defendant must make a prima facie showing that the prosecutor exercised peremptory challenges on the basis of race. *Purkett v. Elem*, 514 U.S. 765, 767 (1995); *Batson*, 476 U.S. at 96-98. If the defendant satisfies this initial burden, the burden then shifts to the prosecutor to articulate a race-neutral explanation for excluding the venire member in question. *Purkett*, 514 U.S. at 767; *Batson*, 476 U.S. at 97. Third, the trial court must determine whether the defendant met his burden of proving purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 359 (1993); *Batson*, 476 U.S. at 98. In making its determination of whether use of a peremptory challenge was discriminatory, the trial court must articulate specific reasons for each of its factual findings. *Woodson*, 916 S.W.2d at 906. The trial court's findings are imperative because rarely will a trial record alone provide a legitimate basis from which to substitute an appellate court's opinion for that of the trial court. *Id.* at 916. Thus, on appeal, the trial court's finding that the State excused a venire member for race-neutral reasons will not be reversed unless it is clearly erroneous. *Id.*

In the case under submission, the trial court noted that one potential juror was originally from Taiwan and said that he did not think that there was a *Batson* issue. The court, however, asked the State to provide its race-neutral reason for exclusion. As such, we assume that the court implicitly found that the Defendants satisfied the first prong of *Batson* and then proceeded with an analysis of the second and third prongs of *Batson*. With respect to the second juror, of Hispanic descent, the trial court found that the Hispanic community is "close" to the African-American community in Hamblen County. The court stated that there could "very well be a *Batson* issue," and the State offered to respond. Again, we find that the trial court implicitly found that the Defendants made a prima facie showing so as to satisfy the first prong. Moreover, although the trial court's findings are relatively sparse, we find the record sufficient for us to undertake our review.

"In reviewing the prosecutor's explanations, we acknowledge that 'many of the judgments made by counsel in picking a jury are purely intuitive and based upon inarticulable factors.'" *State v. Carroll*, 34 S.W.3d 317, 320 (Tenn. Crim. App. 2000) (quoting *United States v. Bently-Smith*, 2 F.3d 1368, 1374 (5th Cir. 1993)). Accordingly, while subjective considerations may not be susceptible to objective rebuttal or verification, they are permitted because of the inherent nature of peremptory challenges, with the understanding that ultimate *Batson* findings will largely turn on the evaluation of the credibility of counsel's explanations. *Id.* Neutral explanations that are based on subjective assessments, such as the jurors demeanor, must be carefully scrutinized. *Id.* At this step, the crucial inquiry is the facial validity of the prosecutor 's explanation. *Hernandez*, 500 U.S. at 360. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral. *Id.*

Indeed, what *Batson* means by a "legitimate reason" is not a reason that makes sense, but a reason that does not deny equal protection. *Purkett*, 514 U.S. at 769 (citations omitted).

With these considerations in mind, we conclude that the basis for the State's use of its peremptory challenges against these two potential jurors, who were ultimately excluded from the venire, was sufficiently race-neutral to dispel any indicia of purposeful discrimination. With respect to the Taiwanese juror, the trial court noted that the juror admitted on orientation day that she could not understand very much English. The State explained that, because of her difficulty understanding the English language, the juror could not understand what jury duty meant. The trial court found that this was a sufficiently race-neutral reason for the State's use of a peremptory challenge. We conclude that the State articulated a valid, race-neutral reason for challenging this juror, and the trial court's decision that the State's reasons were legitimate and non-discriminatory is not clearly erroneous.

We reach the same conclusion with respect to the second juror. The State explained that the second juror, of Hispanic descent, was an interpreter and a "sort of advocate" for defendants in General Sessions Court. Further, she had been interviewed and investigated by the TBI for taking money from Hispanics to get them out on bond. The State explained to the court that it thought that the juror knew that she was being investigated. The State, however, did not feel that it had sufficient evidence to prosecute her. The trial court concluded that this was a sufficient race-neutral reason for the State's exercise of a peremptory challenge of this potential juror, and we conclude that such finding by the trial court was not clearly erroneous.

F. Juror Disqualification

The Defendants next contend that the trial court erred when it failed to grant the Defendants a new trial after the Defendants proved that one of the jurors, Mr. Waddell, gave false statements to the court and therefore should not have been allowed to serve. During the trial, the Defendants expressed concern that Mr. Waddell was related to Darrell Horton, whose name was mentioned during the trial and who was listed as a potential witness on the State's witness list.[8] The trial court questioned Waddell asking:

> Court: The issue would be whether the juror failed to disclose something during voir dire that he should have disclosed, and if and what if any affect [sic] that might have had . . . Mr. Waddell, are you related by marriage to Darrell Horton?
>
> Mr. Waddell: I don't think so. I never heard that. I don't know anybody by that name.

At the motion for new trial, Tammy Cox testified that Darrell Horton was the father of

[8]Phyllis West testified that she spent the night with Darrell Horton on June 25 and June 26, and the two used drugs together.

her two children and that Waddell is her uncle. She said that Waddell knew Horton from family functions that they all attended a few times a year.

The Defendants also assert that Waddell was disqualified to serve as a juror because he failed to disclose other pertinent information, namely that he had a family member involved in law enforcement and that he worked as a plumber for Defendant Allen. The Defendants note that Waddell stated on his juror questionnaire that he has no children, he did not answer the question about whether he has any family members who have ever worked in law enforcement, and he listed his occupation only as a plumber. Tammy Cox testified that Waddell's daughter, Susan, was employed as a law enforcement officer in Jefferson and Hamblen Counties and that she drove a police car. Further, Cox said that Susan helped Horton "get out of trouble." The Defendants assert that Waddell willfully concealed this information and that they are, therefore, entitled to a new trial.

Ruling on the motion for new trial, the trial court found:

> Now, looking at the issue that we have with the juror Mr. Waddell . . . looking at his juror questionnaire, he has filled out some vital statistics, left a lot of things blank. And, unfortunately, I've found a lot of jurors do that. They don't – Especially if one goes for more than two or three pages, they don't answer a lot of the questions. But he does not answer, for instance, where . . . it talks about family members in law enforcement. He doesn't say that there are none; he just doesn't say anything. He doesn't say yes or no. He just leaves it blank. And, in fact, he left blank all the questions about family members, period, children, step-children. Employment for the last ten years. Edu – Barely filled out edu – 10th grade education, G.E.D. he has. Says he was in the Army. Attends Buffalo Trail Baptist Church. His name and address and wife's name, and that's about everything that he filled out. Everything else just left blank.
>
> The issue was raised about the witness or possible witness Darrell Horton. This Court did bring the jury out and personally allocated Mr. Waddell. Mr. Waddell had taken an oath. He was under oath as a juror, and under oath he told this Court that he did not remember, in effect, or could not recall knowing a Darrell Horton. He said that very positively. He swore that under oath.
>
> Today a witness says that she, his niece, says that she thinks he knows Darrell Horton, that even though she hasn't talked to Mr. Waddell and they only see each other casually at some family meetings, that she hasn't spoken to him about his remembrance or knowledge of Darrell Horton.
>
> The fact also looms very heavily that Darrell Horton was not called as a witness in the case.
>
> So under those circumstances this Court would have to conclude that the

> juror, William Waddell, was being honest as he believed his honesty to be in answering those questions under oath to the Court in the presence of everyone in open court and that he did not deliberately misrepresent or falsify anything. And since the witness did not testify, there has been no showing of prejudice in the case. I realize the thrust of the assignment of error is that the witness had a bias because he misrepresented things to the Court, but this Court cannot find that things were misrepresented, and this Court can certainly not find that that particular juror had bias in the case.
>
> Of course the jury, as impaneled, consisted of eleven other people, including one African-American . . . and the one in twelve was a representative percentage of the African-American population in Hamblen County, Tennessee, and even greater than the actual population.
>
> But for all those reasons I believe that the motions for new trial in both of the cases as to these defendants should be and are overruled . . . .

Article I, section 9 of the Tennessee Constitution guarantees a criminal defendant the right to trial "by an impartial jury." In fact, every accused is guaranteed "a trial by a jury free of . . . disqualification on account of some bias or partiality toward one side or the other of the litigation." *State v. Akins*, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1995) (citing *Tooms v. State*, 197 Tenn. 229, 270 S.W.2d 649, 650 (1954)). Thus, the function of voir dire is essential. Voir dire permits questioning by the court and counsel in order to lead respective counsel to the intelligent exercise of challenges. *Id.* (citations omitted). "Since full knowledge of facts which might bear upon a juror's qualification is essential to the intelligent exercise of peremptory and cause challenges, jurors are obligated to make 'full and truthful answers . . . neither falsely stating any fact nor concealing any material matter.'" *Id.* at 354-55 (citing 47 Am. Jur. 2d, *Jury* § 195 (1969)).

In Tennessee, challenges to juror qualifications generally fall into two categories – propter defectum, "on account of defect", or propter affectum "for or on account of some affection or prejudice." *Carruthers v. State*, 14 S.W.3d 85, 94 (Tenn. Crim. App. 2003); *Akins*, 867 S.W.2d at 355. General disqualifications such as alienage, family relationship, or statutory mandate are classified as propter defectum and must be challenged before the return of a jury verdict. *Akins*, 867 S.W.2d at 355. An objection based upon bias, prejudice, or partiality is classified as propter affectum and may be made after the jury verdict is returned. *Id.* "Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the defendant to show that a juror is in some way biased or prejudiced." *State v. Caughron*, 855 S.W.2d 526, 536-37 (Tenn. 1993) (citing *Bowman v. State*, 598 S.W.2d 809, 812 (Tenn. Crim. App. 1980).

In *Akins*, this Court addressed the issue of a juror's failure to disclose information reflecting potential bias or partiality and stated as follows:

> We hold that when a juror's response to relevant, direct voir dire questioning,

> whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias, a presumption of bias arises. While that presumption may be rebutted by an absence of actual prejudice, the court must view the totality of the circumstances, and not merely the juror's self-serving claim or lack of partiality, to determine whether the presumption is overcome.

867 S.W.2d at 357.

Thus, when a juror conceals or misrepresents information tending to indicate a lack of impartiality, a challenge may properly be made in a motion for new trial. *Id.* at 355. "When a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror's lack of impartiality, a presumption of prejudice arises." *Id.* (citing *Durham v. State*, 182 Tenn. 577, 188 S.W.2d 555, 559 (Tenn. 1945)). The presumption of bias, however, may be dispelled by an absence of actual favor or partiality by the juror. *State v. Taylor*, 669 S.W.2d 694, 699 (Tenn. Crim. App. 1983). Moreover, the defendant bears the burden of proving a prima facie case of bias or partiality. *Id.* (citing *Taylor*, 669 S.W.2d at 700).

In the case under submission, the Defendants allege Juror Waddell failed to disclose that he knew Darrell Horton, a potential witness for the State. This issue was challenged before the return of the jury verdict in that Juror Waddell was asked during the trial whether he was related by marriage to Darrell Horton. Juror Waddell swore that he had not heard that and that he did not know anyone by that name. The Defendants presented evidence that Juror Waddell's niece had two children by a man named Darrell Horton and that Waddell had been at the same family functions with Horton. The trial court accredited Juror Waddell's statement, finding that he was honest when he said that he did not know anyone by that name. The Defendants have not proven that Juror Waddell knew Horton or that he even knew the name of the father of his niece's children. Further, Horton never testified at the Defendants' trial. Under these circumstances, we conclude the Defendants have not proven that Juror Waddell was biased or prejudiced because he allegedly knew Darrell Horton.

Further, we conclude that the Defendants have not proven that Juror Waddell was biased because he was allegedly a plumber for Defendant Allen. Juror Waddell listed his occupation as "plumber" but did not mention that he had ever worked for Defendant Allen. Cox's allegations that Juror Waddell worked, at one point, for Defendant Allen are insufficient to prove a prima facie case of bias on the part of Juror Waddell. First, Juror Waddell did not testify concerning these allegations. Juror Waddell may not have ever actually worked for Defendant Allen. Further, even if he had worked for Defendant Allen, he may or may not have recalled so doing. Finally, even had he worked for Defendant Allen and recalled so doing, there is simply no evidence that such employment affected his impartiality so as to affect the outcome of this trial.

We now turn to address whether the fact that Juror Waddell's daughter allegedly worked for law enforcement disqualified him as a juror. In *Taylor*, 669 S.W.2d at 699-700, it was contended that two jurors failed to reveal that members of their family were employed in law

enforcement capacities. In affirming the defendant's conviction, this Court held that an alleged relationship of jurors to people connected with law enforcement, even if true, does not give rise to an inherently prejudicial situation in and of itself. *Id.* at 699. Further, the Court held that "there being no evidence in the record showing actual favor or partiality on the part of either juror affecting the outcome of the trial, we find the assignment challenging this jury to be without merit, and it is accordingly overruled." *Id.* at 700.

In the case under submission, Tammy Cox was the only witness who testified that Juror Waddell's daughter worked in law enforcement. Further, there is no evidence in the record proving that his daughter's associating with law enforcement resulted in actual favor or partiality on the part of Juror Waddell. Accordingly, we conclude that the Defendants have not met their burden of proving a prima facie case of bias or partiality and are not entitled to relief on this issue.

G. Audio Recording

Defendant Smith contends that the trial court erred when it admitted into evidence a tape recording of the conversation he had with and Defendant Jarnigan while they were in the back of a police cruiser. He asserts first that the trial court did not appropriately follow the procedures of Rule 404(b) because it refused to hold a hearing on the admissibility of this evidence; did not determine that a material issue existed other than conduct conforming with a character trait; and did not provide the reasons for admitting the evidence. Further, he contends that the prejudicial effect of this recording outweighed its probative effect because the tape recording includes mentions of other crimes or wrongs, namely drug crimes and the fact that the Defendant was on parole.

First, we note that the admissibility, relevancy, and competency of evidence are matters entrusted to the sound discretion of the trial court. With that principle in mind, we review the trial court's evidentiary rulings for abuse of discretion. *See State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *State v. Gray*, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997). The Tennessee Rules of Evidence make admissible "all relevant evidence . . . except as provided by the Constitution of the United States, the Constitution of Tennessee, these Rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible." Tenn. R. Evid. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Under Tennessee Rule of Evidence 403, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 404(b) states that evidence of "other crimes, wrongs or acts is not admissible to prove the character of a person or to show action in conformity with the character trait" but that such evidence "may . . . be admissible for other purposes." The rule includes the following

procedures for determining the admissibility of 404(b) evidence:

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). The safeguards in Rule 404(b) ensure that defendants are not convicted for charged offenses based on evidence of prior crimes, wrongs, or acts. *State v. James*, 81 S.W.3d 751, 758 (Tenn. 2002). Where the procedures "are substantially followed, the trial court's decision will be given great deference and will be reversed only for an abuse of discretion." *Id.* at 759; *see also DuBose*, 953 S.W.2d at 652. However, the decision of the trial court is afforded no deference, and our review is de novo, if the procedural requirements are not substantially followed. *Id.*

Traditionally, courts have not permitted the State to establish through acts of prior misconduct any generalized propensity on the part of a defendant to commit crimes. *See, e.g., State v. Teague*, 645 S.W.2d 392 (Tenn. 1983). Most authorities suggest that trial courts take a "restrictive approach of 404(b) . . . because 'other act' evidence carries a significant potential for unfairly influencing a jury." *Neil P. Cohen et al.*, Tennessee Law of Evidence § 4.04[8][e] (4th ed. 2000). A jury cannot be allowed to convict a defendant for bad character or any particular disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial. *State v. Rickman*, 876 S.W.2d 824, 828 (Tenn. 1994) (citing *Anderson v. State*, 56 S.W.2d 731 (Tenn. 1933)). In those instances where the prior conduct or acts are similar to the crimes on trial, the potential for a prejudicial result increases. *State v. Mallard*, 40 S.W.3d 473, 488 (Tenn. 2001).

Although Rule 404(b) is generally regarded as being a rule of exclusion, it may equally be viewed as a rule of inclusion, if the prior bad acts or crimes of the accused are admissible for purposes other than to prove character. "Other purposes" have been defined to include: (1) motive; (2) intent; (3) guilty knowledge; (4) identity of the defendant; (5) absence of mistake or accident; (6) a common scheme or plan; (7) completion of the story; (8) opportunity; and (9) preparation. *Collard v. State*, 526 S.W.2d 112, 114 (Tenn. 1975); *see also Neil P. Cohen, et al.*, *Tennessee Law of Evidence* § 404.6 (3d ed. 1995). Additionally, the other purposes "must meet the relevancy requirement of Rule 401; the defined purpose for introduction of the prior bad acts of the accused must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

The Defendant first contends that the trial court did not follow the procedural

requirements of Rule 404(b) because it failed to (1) conduct a hearing on the 404(b) issue and (2) failed to determine that a material issue exists other than conduct conforming with a character trait and (3) did not provide the reasons for admitting the evidence. The record evinces that the trial court did, in fact, provide a hearing on this issue. Outside the presence of the jury, the following occurred:

> THE COURT: Okay. We've had several discussions in chambers as we've waited . . . to get ready this afternoon, and there's been an expression or desire to put some things on the record so I would like to give you an opportunity at this time to do just that.
>
> . . . .
>
> THE COURT: There was a redaction that needed to be made in a recorded conversation between I think Mr. Smith and Ms. Jarnigan in a vehicle while there was a searching going on, and I have ruled that that's admissible previously. There was some question about the mention of the search warrant and, of course, the court did, as it always does, exclude[] the search warrant from admissibility at the trial because the search warrant contains hearsay information that's not allowed to go to the jury. But . . . this conversation . . . had references to the search warrant. I have ruled that those references can remain in. They have to remain in because it makes absolutely no sense, the conversation does, without those allusions.
>
> I'm going to give [Defense Counsel] an opportunity to address that matter and preserve an objection to it for the record in just a minute.
>
> . . . .
>
> So now, [Defense Counsel], let me allow you to state your objection to the Court's ruling for the record.
>
> . . . .
>
> [DEFENSE COUNSEL]: I want to address . . . the contents of the tape under 404(b)(1). Of course, this is the out of court hearing which I have requested, but I have not seen anything showing why this material is relevant to come in. There's absolutely no reason other than the fact that it makes the conversation flow a lot better. But when you weigh that against my client's constitutional right to have a fair trial with other wrongs brought up against him, the appropriate remedy, I suggest, would be to exclude the whole thing if it doesn't make sense, other than bring in things about drugs.
>
> THE COURT: There is no constitutional right not to have a fact of a search or

search warrant mentioned. The reason for the exclusion of the search warrant is because of the hearsay that it contains, itself, laying the grounds for the search which may contain things that aren't admissible in the case as under 404(b), for instance. But the conversation is clearly an admission exception to the hearsay rule. And the references to the search and the warrant are necessary to understand the conversation and are not separable from it and are, therefore, admissible.

[DEFENSE COUNSEL]: Your Honor, I don't want to belabor the point, but just to preserve the record under 404(b)(2), I would like on the record the material issue, the ruling, and the reason for admitting those. There has to be another material issue other than – That is all I'm saying, your Honor.

THE COURT: I find that this is not a 404(b)(2) issue, period.

While the trial court gave the Defendant a hearing, it determined that this was not a 404(b) issue. We respectfully disagree. The conversation clearly included mention of the Defendant's possession of drugs and drug paraphernalia and also the fact that the Defendant was on parole. As such, it does fall within the purview of 404(b) in the sense that it is evidence of "other crimes, wrongs or acts." The evidence, however, was properly admissible for a purpose other than to prove the character of a person or to show action in conformity with the character trait. The tape recorded conversation was offered to prove knowledge of Defendants Jarnigan and Smith about the murder and to complete the story of the crime. Clearly, both Defendants participated in the conversation, and they discussed things that clearly prove guilty knowledge such as: (1) whether the search was for evidence of drugs or a homicide; (2) how the police would not find bloody clothing or shoes to tie them to the homicide; (3) that Defendant Smith would take responsibility for any charges if Defendant Jarnigan was also charged; (4) that they should "stick to the story"; (5) that Defendant Jarnigan should not be concerned with the "dope" but should be concerned about the victim. The conversation also helped complete the story of this crime in that it showed knowledge of Defendant Jarnigan about these events. It further completed the story in that it provided evidence that Defendant Smith asked Defendant Jarnigan to bail him out of jail if he was arrested and that, if she did so, he was "gone." Finally, we conclude that this evidence was relevant and that its probative value was not outweighed by the danger of unfair prejudice. Accordingly, the Defendants are not entitled to relief on this issue.

H. Defendant Allen's Prior Bad Act

Defendant Allen contends that the trial court erred when it allowed evidence of his 2003 charge for the delivery of cocaine to show motive and intent. Further, he asserts that the probative value of this evidence is clearly outweighed by its prejudicial effect. On this issue, the trial court concluded, "The fact of Defendant Allen's charge for delivery of cocaine to the victim/undercover agent can be used under a [Tennessee Rule of Evidence] 404(b) analysis. The material issues are motive and intent and the probative value out[]weighs the danger of unfair prejudice."

The State sought to prove that Defendant Allen was criminally responsible for the victim's murder because Defendant Allen solicited Defendant Smith to commit this murder and Defendant Allen benefitted from the victim's murder. As such, evidence that the victim was a witness in a case where Defendant Allen was charged with the delivery of cocaine and that Defendant Allen wanted the victim murdered so the charges would be dismissed was relevant to prove Defendant Allen's motive and intent to commit this crime. We conclude, therefore, that the trial court did not abuse its discretion when it admitted this evidence, and the Defendant is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing reasoning and authority, we affirm the judgments of the trial court.

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ROBERT W. WEDEMEYER, JUDGE